

IN THE SUPREME COURT  
OF THE  
STATE OF SOUTH DAKOTA

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IN THE MATTER OF THE PROPOSED	)	NOTICE OF RULES HEARING
AMENDMENT OF SDCL 15-6-26(b) (4)	)	
AMENDMENT OF SDCL 15-26A-13	)	NO. 122
AMENDMENT OF SDCL 15-26A-16	)	
AMENDMENT OF SDCL 16-12B-1.3	)	
AMENDMENT OF THE APPENDIX TO CHAPTER	)	
16-2, CANON 3 (B) (7)	)	
AMENDMENT OF SDCL 16-18-2.1	)	
AMENDMENT OF SDCL 16-18-2.2	)	
AMENDMENT OF SDCL 16-18-2.3	)	
AMENDMENT OF SDCL 16-18-2.4	)	
AMENDMENT OF SDCL 16-18-2.5	)	
AMENDMENT OF SDCL 16-18-2.6	)	
AMENDMENT OF SDCL 16-18-2.7	)	
AMENDMENT OF SDCL 16-18-2.8	)	
AMENDMENT OF SDCL 16-18-2.9	)	
AMENDMENT OF SDCL 16-18-2.10	)	
AMENDMENT OF SDCL 23A-27-4.1	)	
AMENDMENT OF SDCL 19-2-13 (Supreme	)	
Court Rule 10-07)	)	
REPEAL OF SDCL 19-2-13 (Supreme	)	
Court Rule 10-07)	)	

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Petitions for amendments of existing sections of the South Dakota Codified Laws and the adoption of new rules having been filed with the Court, and the Court having determined that the proposed amendments and adoptions should be noticed for hearing, now therefore,

NOTICE IS HEREBY GIVEN THAT ON FEBRUARY 16, 2011, at 9:00 A.M., C.S.T., at the Courtroom of the Supreme Court in the Capitol Building, Pierre, South Dakota, the Court will consider the following:

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1. Amendment of SDCL 15-6-26(b) (4). Scope of discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(4) Trial preparation: experts. Discovery of facts known and opinions held by experts, otherwise discoverable under the

provisions of subdivision (1) of this rule and acquired or developed in anticipation of litigation or for trial may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion.

(ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (4) (C) of this section, concerning fees and expenses as the court may deem appropriate.

(B) Trial-preparation for draft reports or disclosures.

SDCL § 15-6-26(b) (3) protects drafts of any report prepared by any witness who is retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involves giving expert testimony, regardless of the form in which the draft is recorded.

(C) Trial preparation protection for communication between a party's attorney and expert witnesses. SDCL § 15-6-26(b) (3) protects communications between the party's attorney and any witness who is retained or specially employed to provide expert testimony in the case or one whose duties as the party's employee regularly involve giving expert testimony, regardless of the form of the communications, except to the extent that the communications:

(i) relate to compensation for the expert's study or testimony;

(ii) identify facts or data that the party's attorney provided and that the expert considered in forming the

opinion to be expressed; or

(iii) identify assumptions that the party's attorney provided and that the expert relied on in forming the opinions to be expressed.

~~(B)~~(D) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in § 15-6-35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

~~(C)~~(E) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (4)(A)(ii) and (4)(B) of this section; and (ii) with respect to discovery obtained under subdivision (4)(A)(ii) of this section the court may require, and with respect to discovery obtained under subdivision (4)(B) of this section the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

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**2. Amendment of SDCL 15-26A-13. Petition for permission to take discretionary appeal.**

An appeal from an intermediate order made before trial as prescribed by subdivision 15-26A-3 (6) may be sought by filing a petition for permission to appeal, together with proof of service thereof upon all other parties to the action in circuit court, with the clerk of the Supreme Court within ten days after notice of entry of such order. When a petition is forwarded to the clerk for filing by mail it shall be accompanied by an affidavit of mailing or

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certificate of service of mailing and shall be deemed to be filed as  
of the date of mailing.

The original and five copies of the petition shall be filed  
with the clerk of the Supreme Court, together with the required  
statutory filing fees unless exempt by law.

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**3. Amendment of SDCL 15-26A-16. Response to petition.**

Within seven days after the service of the petition, any party  
to the action may serve and file a response thereto. The original  
and five copies of the answer shall be filed with the clerk of the  
Supreme Court. When a response to a petition is forwarded to the  
clerk for filing by mail it shall be accompanied by an affidavit of  
mailing or certificate of service of mailing and shall be deemed to  
be filed as of the date of mailing.

The petition and any response shall be submitted without oral  
argument unless otherwise ordered.

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**4. Amendment to SDCL 16-12B-1.3 concerning the removal  
of magistrate judges.**

Section 1. That §16-12B-1.3 be amended to read as follows:

Persons appointed as full-time magistrate judges shall be  
appointed for a ~~full~~ term of four years from and after the date of  
the approval of the appointment by the Supreme Court subject to any  
conditions imposed by the Supreme Court. Full-time magistrate  
judges may ~~shall~~ be subject to removal ~~only~~ upon recommendation of  
the Judicial Qualifications Commission and the action of the Supreme  
Court thereon. The Supreme Court may also, in its discretion, refer  
any matter to the Judicial Qualifications Commission to conduct an  
investigation and file a report with the court concerning the  
conduct of any full-time magistrate judge. Persons appointed as  
part-time magistrate judges shall be appointed by the presiding  
judge of the circuit court, subject to the approval of the Supreme  
Court, and shall serve at the pleasure of the presiding judge. Upon

termination of any appointment the presiding judge shall forthwith notify the state court administrator thereof. Nothing in this section shall be construed to limit the Supreme Court's inherent authority to regulate magistrate judges.

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**5. Amendment to Appendix to Chapter 16-2, Canon 3(B)(7) concerning ex parte communications and problem-solving courts.**

Section 1. That Canon 3(B)(7) and its Commentary be amended to read as follows:

**CANON 3**

**B. Adjudicative Responsibilities.**

(7) A judge shall accord to every person who has a legal interest in a proceeding, or that person's lawyer, the right to be heard according to Law.\* A judge shall not initiate, permit, or consider ex parte communications, or consider other communications made to the judge outside the presence of the parties concerning a pending or impending proceeding except that:

(a) Where circumstances require, ex parte communications for scheduling, administrative purposes or emergencies that do not deal with substantive matters or issues on the merits are authorized; provided:

(i) the judge reasonably believes that no party will gain a procedural or tactical advantage as a result of the ex parte communication, and

(ii) the judge makes provision promptly to notify all other parties of the substance of the ex parte communication and allows an opportunity to respond.

(b) A judge may obtain the advice of a disinterested expert on the law\* applicable to a proceeding before the judge if the judge gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

(c) A judge may consult with court personnel\* whose function is to aid the judge in carrying out the judge's adjudicative responsibilities or with other judges.

(d) A judge may, with the consent of the parties, confer separately with the parties and their lawyers in an effort to mediate or settle matters pending before the judge.

(e) A judge may initiate or consider any ex parte communications when expressly authorized by law\* to do so or when serving on problem-solving courts, treatment courts or drug courts.

B(7) COMMENTARY

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted.

To the extent reasonably possible, all parties or their lawyers shall be included in communications with a judge.

Whenever presence of a party or notice to a party is required by Section 3B(7), it is the party's lawyer, or if the party is unrepresented the party, who is to be present or to whom notice is to be given.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite the expert to file a brief amicus curiae.

Certain ex parte communication is approved by Section 3B(7) to facilitate scheduling and other administrative purposes and to accommodate emergencies. In general, however, a judge must discourage ex parte communication and allow it only if all the criteria stated in Section 3B(7) are clearly met. A judge must disclose to all parties all ex parte communications described in Sections 3B(7)(a) and 3B(7)(b) regarding a proceeding pending or impending before the judge.

Canon 3(B)(7)(e) recognizes a judge may initiate, permit, or consider ex parte communications in certain circumstances; such as when serving on problem-solving courts. In this capacity, judges may assume a more interactive role with parties, treatment providers, probation officers, social workers and others as part of the problem-solving court team.

A judge must not independently investigate facts in a case and must consider only the evidence presented.

A judge may request a party to submit proposed findings of fact and conclusions of law, so long as the other parties are apprised of the request and are given an opportunity to respond to the proposed findings and conclusions.

A judge must make reasonable efforts, including the provision of appropriate supervision, to ensure that Section 3B(7) is not violated through law clerks or other personnel on the judge's staff.

If communication between the trial judge and the appellate court with respect to a proceeding is permitted, a copy of any written communication or the substance of any oral communication should be provided to all parties.

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**6. Amendment of SDCL 16-18-2.1. Legal assistance by law students--Purpose of provisions.**

The bench and the bar are primarily responsible for providing competent legal services for all persons including those unable to pay for these services. As one means of providing assistance to lawyers and to encourage law schools to provide ~~clinical~~ field placement instruction in legal work of varying kinds, §§ 16-18-2.2 to 16-18-2.10, inclusive, are adopted. For the purposes of §§ 16-18-2.1 to 16-18-2.10, "extern" means a student in a field placement program for academic credit offered by a school of law in accordance with the American Bar Association Standards for Approval of Law

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Schools, and "intern" means any other student providing legal  
assistance under the supervising lawyer.

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**7. Amendment of SDCL 16-18-2.2. Requirements for  
participation by law student.**

In order to make an appearance and to participate pursuant to  
§§ 16-18-2.1 to 16-18-2.10, inclusive, the law student must:

- (1) Be duly enrolled in or a graduate of the school  
of law of the University of South Dakota or a law school  
approved by the American Bar Association.
- (2) Have completed legal studies amounting to at  
least four semesters or the equivalent if the school is on  
some basis other than a semester basis.
- (3) Be certified by the dean of such law school as  
being of good moral character and competent legal ability,  
and as being adequately trained to perform as a legal  
intern or extern. As a part of the certificate the dean  
shall set forth the termination date of the certificate.  
No certificate shall remain in effect in excess of  
eighteen months after it is filed.
- (4) Be introduced to the court in which he or she is  
appearing as a legal intern or extern by a lawyer  
authorized to practice law in this state.
- (5) Neither ask nor receive any compensation or  
remuneration of any kind for his or her services from the  
person on whose behalf he or she renders services, but  
this shall not prevent a lawyer, legal aid bureau, law  
school, public defender agency, or the state from paying  
compensation to the legal intern, nor shall it prevent any  
agency from making such charges for its services as it may  
otherwise properly require, or prevent any agency or  
lawyer from reimbursing a legal intern or extern for



reasonable, out-of-pocket expenses related to the field placement.

(6) Certify in writing that he or she has read and is familiar with the rules of professional conduct of the Supreme Court of South Dakota, this title and the provisions of §§ 19-13-2 to 19-13-5, inclusive, and agree to govern his or her conduct accordingly. Such certification shall either be made part of or shall be annexed to the certification of the dean of the law school as required by subdivision (3) of this section.

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**8. Amendment of SDCL 16-18-2.3. Certification of legal intern or extern by law school dean--Filing--Effective period--Withdrawal by dean or termination by Supreme Court.**

The certification pursuant to § 16-18-2.2 by the law school dean of a law student to become and perform as a legal intern or extern:

(1) Shall be filed with the clerk of the Supreme Court and, unless it is sooner withdrawn, it shall remain in effect until the expiration of the term fixed by the certificate of the dean, or until the announcement by the Board of Bar Examiners of this state of the results of the first bar examination following the student's graduation, whichever is earlier. Provided, that as to any student who passes such examination, or for whom such examination is waived pursuant to the former § 16-16-6.1, the certification shall continue in effect until the date he or she is admitted to practice law pursuant to § 16-16-17; but such continuation shall not exceed three months. However, any student who fails such examination on the first occasion may apply to the dean of such law school and obtain, upon a showing of good cause in good faith, an extension certificate until the results of the next bar examination are announced.

(2) May be withdrawn by the dean at any time by mailing a notice to that effect to the clerk of the Supreme Court, which shall be filed by the clerk. Such withdrawal may be without notice or hearing and without any showing of cause.

(3) May be terminated by the Supreme Court at any time without notice or hearing and without any showing of cause. Notice of termination shall be filed with the clerk of the court.

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**9. Amendment of SDCL 16-18-2.4. Consent and approval for appearance by legal intern or extern --Authority for appearance in civil and criminal matters.**

A legal intern or extern may appear and participate in any proceeding in any court or before any administrative agency in this state on behalf of any person in the following matters and under the following circumstances:

(1) In any civil matter. In such matters the supervising lawyer shall certify to the court or the administrative agency, orally or in writing, that the client has consented to the appearance of the legal intern or extern. The supervising lawyer is not required to be personally present in court or before the administrative agency if the supervising lawyer certifies to the court or the administrative agency, orally or in writing, that the client consents to his or her absence.

(2) In any criminal or quasi-criminal matter, and whether the defendant does or does not have the right to the assignment of counsel under any constitutional provision, statute, or rule of the Supreme Court of this state or of the United States. In such matters the client shall consent in writing and the supervising lawyer shall approve in writing the appearance by the legal intern or extern and the supervising lawyer shall be personally

present throughout the proceedings; provided, however, in matters where the proceedings do not involve a critical stage, the legal intern or extern may appear in the absence of the supervising lawyer and without such written consent and approval if the supervising lawyer certifies to the court, orally or in writing, that the client has consented to such appearance by the legal intern or extern.

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**10. Amendment of SDCL 16-18-2.5. Appearance by legal intern or extern for state, county, or first or second class municipality.**

A legal intern or extern may appear in any civil, criminal, or quasi-criminal matter on behalf of the state, a county, or a first or second class municipality with the written approval of the attorney general, state's attorney, or city attorney, as the case may be. The legal intern or extern shall be under the supervision of the approving attorney, or of a deputy or assistant thereof, who has the responsibility as supervising lawyer. The approval may be for a specific case or matter or may be general for a series or type of cases or matters as appears in order to the approving attorney. The approval may be withdrawn at any time by the approving attorney without notice, hearing, or cause stated; and the withdrawal shall be filed pursuant to § 16-18-2.8. Unless the court orders otherwise, the appearance by the legal intern or extern may be in the absence of the supervising lawyer.

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**11. Amendment of SDCL 16-18-2.6. Preparation of pleadings, briefs and other documents by legal intern or extern.**

In addition to the activities authorized under §§ 16-18-2.4 and 16-18-2.5, except as may be limited by the certificate of the dean, a legal intern or extern may engage in other activities, under the general supervision of a supervising lawyer, but outside the personal presence of that lawyer, including but not limited to

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preparation of pleadings, abstracts, and other documents in any  
matter; but any item requiring signature under rule or statute must  
be signed by a lawyer authorized to practice law in this state.

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**12. Amendment of SDCL 16-18-2.7. Oral argument by legal  
intern or extern before Supreme Court.**

A legal intern or extern may participate in oral argument  
before the Supreme Court but only in the presence of the supervising  
lawyer who shall certify to the court in his or her introduction of  
the legal intern or extern to the court that the client has approved  
the participation by the legal intern or extern.

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**13. Amendment of SDCL 16-18-2.8. Notation of oral consent  
and approval of appearance by legal intern or extern--Filing of  
written consent.**

In each case where the consent and/or approval referred to in  
§§ 16-18-2.4, 16-18-2.5, and 16-18-2.7 is required, any oral  
certification of a supervising lawyer shall be noted by the court or  
presiding officer of the administrative agency on its records of the  
case and any written consent and/or approval shall be filed in the  
record of the case and shall be brought to the attention of the  
judge of the court or the presiding officer of the administrative  
agency. Provided, however, a general approval by the attorney  
general, state's attorney, or city attorney pursuant to § 16-18-2.5  
shall be filed with the clerk of the applicable court and brought to  
the attention of the judge thereof.

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**14. Amendment of SDCL 16-18-2.9. Qualifications of  
supervising lawyer--Professional responsibility.**

A supervising lawyer under whose supervision a legal intern or  
extern does any of the things permitted by §§ 16-18-2.4 to 16-18-  
2.7, inclusive, shall be a lawyer authorized to practice law in this  
state, and:

(1) Shall be approved by the dean of the school of law of the University of South Dakota or by the director of the ~~elinical law~~ externship program of the school of law; and such approval by the dean or the director may be general, may have time, scope, or case limitations, or may be on an ad hoc case by case basis; all such as the dean or the director shall from time to time determine. The approval may be modified or withdrawn by the dean or the director at any time without notice or hearing and without any showing of cause. Such approval shall be in writing except that at the option of the dean or the director the approval may be oral for all matters relating to the ~~elinical law~~ externship program.

(2) Shall assume personal professional responsibility for the conduct of the legal intern or extern.

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**15. Amendment of SDCL 16-18-2.10. Other rights not affected by provisions for legal assistance by legal interns or externs.**

Nothing contained in §§ 16-18-2.1 to 16-18-2.9, inclusive, shall affect the right of any person who is not admitted to practice law to do anything that he or she might lawfully do prior to the adoption of §§ 16-18-2.1 to 16-18-2.9, inclusive.

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**16. Amendment of SDCL 23A-27-4.1. Relief from judgment -- Grounds -- Time of motion.**

~~Within a reasonable time but not more than one year after final judgment, a~~ A court on motion of a defendant or upon its own motion may relieve a defendant from final judgment if required in the interest of justice. If the original trial was by a court without a jury, the court on motion of a defendant or upon its own motion, may vacate the judgment if entered, order a new trial or take additional testimony and direct the entry of a new judgment.

A motion under this section does not affect the finality of a judgment or suspend its operation.

A motion under this section must be filed and served on the prosecuting attorney within a reasonable time but not more than two years after the entry of the final judgment or within one hundred twenty days after receipt by the court of a remittitur issued upon affirmance of the judgment or dismissal of the appeal, whichever is later. If an appeal is pending, the court may grant a motion under this section only upon remand of the case.

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**17. Amendment of SDCL 19-2-13, Medical Privacy (Supreme Court Rule 10-07)**

The Court may, upon a showing of good cause direct that ~~T~~the production of a record of a health care provider, ~~whether in the litigation before the Court or a claim,~~ does not waive any privilege which exists with respect to the record, other than for use in the litigation ~~or claim~~ in which it is produced. The Court may, upon a showing of good cause, further direct that ~~A~~any person or entity receiving such a record may not reproduce, distribute, or use it for any purpose other than the litigation ~~or claim~~ for which it is produced.

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**18. Repeal of SDCL 19-2-13, Medical Privacy (Supreme Court Rule 10-07)**

~~The production of a record of a health care provider, whether in litigation or a claim, does not waive any privilege which exists with respect to the record, other than for use in the litigation or claim in which it is produced. Any person or entity receiving such a record may not reproduce, distribute, or use it for any purpose other than the litigation or claim for which it is produced.~~

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Any person interested may appear at the hearing and be heard, provided that all objections or proposed amendments shall be reduced to writing and the original and ten copies thereof filed with the Clerk of the Supreme Court no later than February 2, 2011.

Subsequent to the hearing, the Court may reject or adopt the proposed rule or any rule germane to the subject thereof.

Notice of this hearing shall be made to the members of the State Bar by publication of this notice in the January and February 2011, State Bar Newsletters.

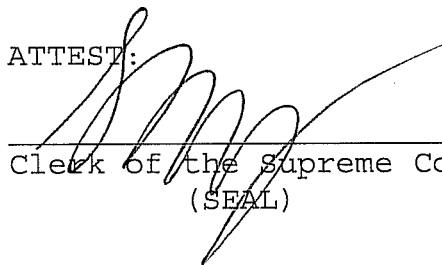
DATED at Pierre, South Dakota this 28th day of December, 2010.

BY THE COURT:



David Gilbertson, Chief Justice

ATTEST:



Clerk of the Supreme Court  
(SEAL)

SUPREME COURT  
STATE OF SOUTH DAKOTA  
**FILED**

DEC 28 2010

  
Clerk